No. 89-1665

In The

Supreme Court of the United States

October Term, 1989

TIMOTHY KIRKLAND,

Petitioner,

vs.

NORTHSIDE INDEPENDENT SCHOOL DISTRICT,

Respondent.

On Petition For A Writ Of Certiorari To The Texas Court Of Appeals For The Fourth Supreme Judicial District

BRIEF OF RESPONDENT, NORTHSIDE INDEPENDENT SCHOOL DISTRICT

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Respondent Northside Independent School District respectfully requests this Court to deny the Petition for Writ of Certiorari, seeking review of the opinion of the United States Court of Appeals, Fifth Circuit rendered on December 22, 1989. That opinion is reported at 890 F.2d 794.

STATEMENT OF THE CASE

Petitioner, Timothy Kirkland, served as a probationary teacher for two academic years for the Northside Independent School District. His contract was not renewed for the 1988-1989 school year. The reasons given for his nonrenewal were use of a nonapproved reading list in his World History class, poor supervision of a special-discipline class, substandard teaching evaluations and poor interaction with parents, students and fellow teachers. The primary focus of Kirkland's suit and this petition is that his First Amendment rights were violated by Northside's requirement that he obtain administrative approval for use of his own supplemental reading list for his World History class. A supplemental reading list for that subject had been adopted by Northside. The district-wide list had been prepared by a process that included teacher, administrator and parent input. A teacher was permitted to use his own supplemental list once it was approved by the administration.

It is undisputed that Kirkland knew of the existence of the approved book list and its method of adoption prior to his distribution of his own list. Further, Kirkland knew of the procedures for substituting his own list or for adding selections to the approved list. It is also undisputed that Kirkland failed to make any attempt to obtain administrative approval of his reading list but simply gave it to the students. His list of forty-seven (47) books for a World History class was almost exclusively fiction. Most of the books on Kirkland's list were already on supplemental reading lists for Northside's English courses and all the books were available in the school's library. Finally, it is undisputed that Kirkland never

raised any objections to or First Amendment questions concerning the supplemental book list procedures until after he learned of his proposed nonrenewal. What had been a failure to follow a curriculum development policy in the fall of 1987 belatedly materialized into an act of First Amendment principle when he learned of his proposed nonrenewal in the spring of 1988.

REASONS WHY THE PETITION SHOULD BE DENIED

I. THE COURT OF APPEALS CORRECTLY HELD THAT THE PETITIONER'S FAILURE TO FOLLOW DISTRICT POLICY ON UTILIZATION OF A SUPPLEMENTAL READING LIST WAS A MATTER OF PRIVATE CONCERN NOT RISING TO A CONSTITUTIONALLY PROTECTED RIGHT.

The Fifth Circuit correctly applied the law as stated in *Connick v. Myers*, 461 U.S. 146, 103 S. Ct. 1684, 75 L.Ed.2d 708 (1983), in holding that Kirkland's failure to follow Northside's policy on supplemental book lists was not a matter of public concern and therefore did not give rise to a federal civil rights cause of action.

> We hold only that when a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior.

Connick v. Myers, supra at 148.

Viewing "the content, form and context of"[1] Kirkland's failure to follow Northside's policy on supplemental reading lists, his conduct cannot be found to have represented any statement concerning an issue of public concern. Kirkland's actions involved the curriculum development process of Northside and his belief that he alone should choose the books on his reading list. Neither his actions nor that of Northside gave any indication that Kirkland was raising an issue of public concern about censorship until the question of his nonrenewal arose several months after his action on the book list. If he had followed the District's policy, there is no indication in the record that any of the materials on Kirkland's list would have been rejected for other than sound curriculum reasons. The fact that the vast majority of the books were on approved reading lists for other courses and that all of the books were in the school library certainly does not support Kirkland's claim that the District was in some manner attempting to stifle his freedom of speech. As held by the Fifth Circuit after reviewing the parties' actions in the context in which they were taken, this case "presents nothing more than an ordinary employment dispute" which does not give rise to a civil rights violation. *Kirkland v. Northside I.S.D., supra* at 802.

II. THE QUESTION OF WHETHER PETITIONER's CONDUCT WAS PROTECTED SPEECH WAS A QUESTION OF LAW NOT FACT, AND THEREFORE THE COURT OF APPEALS APPLIED THE CORRECT STANDARD OF APPELLATE REVIEW.

The Fifth Circuit was not required to apply a "clearly erroneous" or "abuse of discretion" standard of review to

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[1] Connick v. Myers, supra at 148-149.

the trial court's judgment because "the inquiry into the protected status of speech is one of law, not fact." *Connick v. Myers*, 461 U.S. 38, 149, n. 7 (1983).

In footnote 10 of Connick, the Court states:

> The Constitution has imposed upon this Court final authority to determine the meaning and application of those words of that instrument which require interpretation to resolve judicial issues. With that responsibility, we are compelled to examine for ourselves the statements in issue and the circumstances under which they [are] made to see whether or not they . . . of a character which the principles of the First Amendment, as adopted by the Due Process Clause of the Fourteenth Amendment, protect." *Pennekamp v. Florida*, 328 U.S. 331, 335, 66 S. Ct. 1029, 1031, 90 L.Ed. 1295 (1946) (footnote omitted).

Connick v. Myers, 461 U.S. 138, 151, n. 10 (1983).

Therefore, Petitioner's reliance upon cases involving review of factual findings by a trial court are not pertinent to the issue before this Court. Further, under any standard of review, the facts of this case do not support any other conclusion than that reached by the Fifth Circuit. Kirkland's conduct involved a matter of private concern and therefore did not involve constitutionally protected speech.

CONCLUSION

For the reasons set forth, Respondent Northside Independent School District prays that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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